

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES ex rel. DAVID B. KUSNER,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
OSTEOPATHIC MEDICAL CENTER of	:	
PHILADELPHIA, et al.,	:	NO. 88-9753
	:	
Defendants.	:	

MEMORANDUM ORDER

AND NOW, on this 24th day of April, 1998, there is presently before the Court two motions of relator David B. Kusner ("Kusner"): (1) motion to stay all proceedings (Document No. 51); and (2) motion for review and appeal to United States District Court for the Eastern District of Pennsylvania from Clerk's Taxation of Costs (Document No. 48). The Court is also considering the response of defendants to the motion to appeal the taxation of costs (Document No. 50), letters of defendants dated 4/2/98 and 4/20/98, and letter of Kusner dated 4/16/98. And, having found and concluded that:

1. Kusner brought this *qui tam* action pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3733 against defendants. On October 21, 1997, this Court, after a hearing and briefing by the parties, dismissed with prejudice the complaint for lack of prosecution. The Court found, *inter alia*, that Kusner was ultimately responsible for the delay in prosecuting his case despite his efforts to find an attorney to represent him in this matter. Defendants filed their bill of costs on October 31, 1997. A telephone conference on the taxing of costs was coordinated by the Clerk of the Court on March 12, 1998, in which Kusner participated *pro se*;
2. The Clerk of Court entered judgment in favor defendants and against Kusner in the amount of \$1,696.84 (referred to as "Taxation of Costs memorandum"). (Document Nos. 46, 47). Kusner's appeal of this judgment is properly regarded as a motion for review under Federal Rule of Civil Procedure

54(d)(1);¹

Motion to Stay Proceedings

3. On March 31, 1998, Kusner filed a motion urging this Court to stay all proceedings indefinitely until he could obtain legal counsel. Kusner also claims that he has expended significant efforts in consulting attorneys about his case in recent weeks. Defendants volunteered that a two week period of further delay seemed appropriate, (Letter of 4/2/98), but when, in Kusner's Letter of 4/16/98, he pleaded for more but indefinite period of time, defendants protested;

4. I find that Kusner has had a *de facto* stay of over three weeks to retain counsel since the filing of his motion at the end of March 1998. To date, however, no appearance of legal representation on behalf of Kusner has been entered on the docket. Bearing in mind that this case was dismissed for lack of prosecution primarily due to the inability of Kusner to secure counsel, I find that there is little likelihood that Kusner can obtain counsel and thus no reason to stay the proceedings to afford Kusner more time. Accordingly, I will deny the motion of Kusner to stay the proceedings. I will next determine the merits of Kusner's motion for review and appeal of the Clerk of Court's Taxation of Costs;

Motion for Review and Appeal of Clerk's Taxation of Costs

5. In considering such a motion, the court's review of the Clerk of Court's taxation of costs is *de novo*. Krouse v. American Sterilizer Co., 928 F. Supp. 543, 544-45 (W.D. Pa. 1996) (citing Ezold v. Wolf, Block, Schorr & Solis-Cohen, 157 F.R.D. 13, 15 (E.D. Pa. 1994)). Costs are presumptively awarded to a prevailing party unless the award would be inequitable. Smith v. SEPTA, 47 F.3d 97, 99 (3d Cir. 1995) (citing Friedman v. Ganassi, 853 F.2d 207, 211 (3d Cir. 1988)). The Court of Appeals for the Third Circuit has held that "the denial of costs to the prevailing party . . . is in the nature of a penalty for some defection on [its] part in the course of the litigation." Id. (internal quotations and citations omitted).

It is within the discretion of the district court to determine whether and to what extent it should award costs against a plaintiff. Croker v. Boeing Co. (Vertol Division), 662 F.2d 975, 998 (3d Cir. 1981);

¹ Rule 54(d)(1) provides, in pertinent part:

. . . costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs. . . . Such costs may be taxed by the clerk on one day's notice.

already

6. Kusner, in his motion and memorandum, rehashes many arguments decided by this Court in the adjudication of the motion to dismiss for lack of prosecution. Buried within, Kusner makes essentially three arguments. First, he asserts that the award of costs would have a chilling effect upon future relators. Second, Kusner argues that it is not equitable to award costs against him under the factual circumstances of this case where he had “naive trust” in his lawyers, where he made unsuccessful efforts to obtain legal representation, and where he did not allow, willfully or in bad faith, his case to languish. Third, Kusner argues that the purpose of the case was not frivolous, vexatious, or brought to harass and that his mental and physical health as well as his financial status have suffered due to the lawsuit;

7. I am not persuaded by any of these arguments. I find that Kusner has not, to the satisfaction of this Court, overcome the strong presumption that the prevailing party, that being defendants in our case, is entitled to a taxation of costs. See Smith, 47 F.3d at 100 (holding that neither disparity between the parties’ financial resources nor the losing party’s financial status provided a basis for reducing costs). Courts have imposed costs against a losing relator in *qui tam* actions. See United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1413 (9th Cir. 1995), cert. denied, 517 U.S. 1104 (1996); cf. United States ex rel. Mikes v. Straus, 931 F. Supp. 248, 262 (S.D.N.Y. 1996). And, as the Clerk of the Court stated in the Taxation of Costs memorandum, “[n]o statute or rule of court bars taxing of costs in cases such as these.” (Taxation of Costs Mem. at 2). Moreover, none of the conduct of defendants during the course of this litigation would justify a reduction of the taxing costs. See Smith, 47 F.3d at 99-100. While the Court does not intend to trivialize the strain this lawsuit may have placed on Kusner and his family, the arguments of Kusner do not convince this Court that the taxation of costs awarded against him is inequitable;

8. It is important to note that nowhere in his memorandum does Kusner challenge the actual total amount of costs that have been taxed by the Clerk of the Court. Reviewing the Taxation of Costs memorandum, I find that the total costs taxed against Kusner in the amount of \$1,696.84 are reasonable. Broken down, the costs include \$1,480.50 for depositions, \$76.34 for printing, and \$140.00 for witness fees;

9. In light of the foregoing, I will deny the motion for review and appeal of Kusner and affirm the Clerk of Court’s Taxation of Costs judgment; and

it is hereby **ORDERED** that the motion of Kusner to stay the proceedings is **DENIED**.

IT IS FURTHER ORDERED that the motion to review and appeal the Clerk of Court's Taxation of Costs is **DENIED** and the Clerk of Court's Taxation of Costs judgment is **AFFIRMED**.

LOWELL A. REED, JR., J.